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Laurie Williams (ORC-3)
Assistant Regional Counsel
U.S. EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105

CONFIDENTIAL SETTLEMENT OFFER – SUBJECT TO RULE 408

Dear Laurie,

The following is RAML's proposal to conduct work on the RWPR. In evaluating this proposal, it is important for you to recognize that not only does RAML strongly disagree with your legal position regarding RAML's liability and the basis for your proposed Order, RAML also strongly disagrees with the technical assumptions and claims you have made. We do not believe that you have provided evidence to back up any of your allegations.

First off, as you know, RAML is not liable for the actions of Kerr-McGee. Those liabilities remain with Tronox. EPA, by means of the active involvement of the DOJ in the fraudulent conveyance adversary action between Tronox and Anadarko, is currently pursuing Tronox' assets to cover those liabilities. As we have noted, the EPA prevented RAML from making any claims in that litigation, by advising the court that the EPA was responsible for the use of any money obtained for environmental remediation. The EPA has already obtained all of the available remedial environmental funds currently available from Tronox. Kerr-McGee is responsible for this Site, and having barred RAML from making a contribution claim, the EPA is obligated to obtain the funding for those remedial actions from Kerr-McGee's successors and use it at the Site.

Your allegations against RAML rest on alleged releases taking place at the Site while Kerr-McGee Nuclear Corporation [KMNC] (which RAML purchased) was allegedly an operator from 1974-1983. We have literally thousands of different documents that are exchanges of correspondence between the DOI, BIA, BLM, EPA, the State of New Mexico, the Navajo Nation, and many other governmental entities and the operator of the Site during this time period. Of these documents, only a mere handful are addressed to or refer in any way to KMNC. The rest are all addressed to, and responded by, Kerr-McGee. As we understand it, the EPA's entire evidentiary basis for alleging that KMNC was an operator rests on KMNC's creation and a single NPDES permit having been transferred to KMNC by Kerr-McGee. That single piece of

evidence is overwhelmed by the extensive record of documents that demonstrate that Kerr-McGee alone operated the facility the entire time. One notable example is that when Kerr-McGee was seeking to amend its existing mining plan at the Site, and seeking to expand the operations to two more nearby facilities, the USGS mistakenly referred to KMNC as being involved. Kerr-McGee was quick to point out that KMNC was not the lessee and not the entity with which agreements must be made. *See* Letter from F.A. McPherson to Dale Jones, dated October 21, 1976. Kerr-McGee did not transfer the leases to KMNC until after production at the Site had ceased. When Kerr-McGee submitted this plan in 1975, the USGS asked a series of questions, including a listing of all mines owned by Kerr-McGee in the Ambrosia Lake District. In a response dated June 19, 1975, Kerr-McGee described KMNC as the owner of 9 mines and a mill in the Ambrosia Lake District, but notably differentiated the subject Site in stating that the Church Rock mines were "owned and operated by Kerr-McGee."

Further, the technical evidence is overwhelming that any contaminant threat posed by the RWPR is the result of its construction, not from any haul truck spillage. Spillage does not reach depths of 3 feet. The RWPR was constructed before KMNC existed. *See* the initial applications for mining the Site submitted by Kerr-McGee in 1971. You have failed to present any evidence that KMNC was responsible for the construction or later maintenance of the RWPR. Instead, you rely on an assumption that there must have been some spillage from haul trucks that resulted in impacts to the RWPR. Putting aside for a moment the lack of evidence that KMNC operated any haul trucks, your allegations appear to rest solely on the statement that "you have seen this at other sites." That is not evidence.

When Kerr-McGee filed the applications described above, the District Highway Engineer for the State Highway Department of New Mexico sent a letter to the Department of the Interior, USGS on July 25, 1975, regarding this Site, in which he stated "The ore is generally wet and of such a size that with the freeboard available, dust and spillage on the highway is not a problem." Indeed. Witnesses and production records demonstrate that the ore sent from this Site for milling was valuable, wet and in large pieces. However, it is conceivable that some tracking of ore material from the Site could have occurred and subsequently been deposited on the road surface near to the Site.

In short, the EPA has not provided us with evidence that RAML is liable under CERCLA for the action you are demanding.

Second, the various actions the EPA has taken to date regarding the Quivira Site and its environs have all been labeled "time-critical removal actions." This piecemeal approach appears to have been taken in order to avoid the development and appropriate public review of an overall remedial action. Instead, the EPA has unilaterally and sporadically demanded various remedial actions without any deliberation as to how they ought to be considered as a whole and how they work with each other, and has avoided any review or process by claiming they are all "time critical removal actions." While the initial demands you made two years ago may have arguably fit this category, these new demands clearly do not. You have repeatedly phrased the actions you

want taken as a Final Remedy for the RWPR. Final Remedies are not Removal Actions. A Final Remedy must go through an evaluation process.

The EPA's failure to subject these actions to the evaluation process required by the NCP has now led to a demand for an action that would render previous expensive and effective actions a waste of time and money, and potentially could recontaminate an area that UNC would have just cleaned. Had the remedial actions gone through an evaluative process, that would not have happened. The EPA's short-cutting of CERCLA statutes and its own regulations has resulted in an arbitrary and capricious decision that prohibits the EPA from issuing a valid Order.

This is most egregiously demonstrated by the demand that the RWPR be excavated to a level of 2.24 pCi/g. There is no evidence that a road needs to be remediated to such an extravagant and unjustified level. Rather than have a remedial goal established through the regulatory process, you have unilaterally demanded an unjustified and unwarranted standard. Extrapolating a standard from a nearby site where the dubiously performed risk assessment was driven by supposed concerns regarding uptake from grazing animals and vegetables is clearly an arbitrary and capricious act when demanded for a road.

Finally, you have provided no evidence of any emergent danger. Just three months ago the EPA agreed that RAML had mitigated all dangers presented by the RWPR. Now, because you want a Final Remedy performed immediately for mere expediency, you have suddenly claimed dangers exist. You have presented no evidence for this claim, you have simply made an unsupported allegation to justify the EPA's failure to comply with the law. EPA's own regulations spell out the factors that must be considered when determining the appropriateness of a Removal Action. Convenience and expedience are not relevant to that analysis. *See* 40 C.F.R. 300.415(b)(2). Moreover, both the Environmental Appeals Board and judicial courts have rejected EPA remedial Orders that failed to provide sufficient factual support. *See In re Port Authority of New York and New Jersey,* 10 E.A.D. 61 (2001) and *United States v. Wash. State Dept of Transp.*, 2007 WL 445972 (W.D. Wash. 2007).

RAML will not agree to the unlawful and unsupported demands contained in your threat of a Unilateral Order. However, in an effort to resolve this matter and address any potentially genuine issues of concern, RAML is willing to take certain steps regarding the RWPR. The offer is not an admission of the validity of any of the legal and technical claims made by the EPA in this matter, which RAML vigorously denies and will dispute in any further proceedings. RAML makes the following offer as a good faith effort to resolve a disputed claim.

- Tracking of ore material from the mine loadout to the road could have potentially impacted the upper 6 inches of the road and its shoulders (the "road surface") from the RAML gate to the intersection of RWPR with State Highway 566. Given constructability considerations, RAML will agree to remove up to 12 inches of road surface materials if the EPA will agree that this action will resolve all alleged RAML liability for the road

surface. This action will address the alleged issues near where any tracking would have occurred close to the Site, as supported by the data.

- However, it is recognized that windblown material from the UNC Site and potentially tracking or spillage from their activities, has also contributed to the elevated concentrations on the road and shoulders. Furthermore, UNC is already responsible for removing excavated material from the East Drainage Site to its former Mine Site pending final disposition, likely at its Mill Site.

- Thus, the excavated material from the road surface should also be removed to the UNC Mine Site for staging until final disposal. UNC will be responsible for the management of all this waste up to and including its final disposition. RAML will not enter into negotiations with the landowners or be responsible for any waste material added to the Quivira Site.

- Compacted clean fill up to 12 inches will replace the removed material. The final road surface would be returned to the original surface with appropriate contouring and compaction, grading of the shoulders and replacement of vegetation.

- Timing of this work will be coordinated with the work being conducted by UNC at the East Drainage so as not to damage completed work or re-contaminate reclaimed areas.

We believe that this proposal extends well beyond the legal obligations of RAML, and addresses any potential health concerns posed by the RWPR. If the EPA is willing to accept this proposal, please contact me about amending the current AOC to include this as supplemental work. RAML is prepared to begin the work as soon as reasonably possible.

Sincerely,

Mitchell J. Klein

MJK:lld
cc: Claire Trombadore
Ken Black
Mark Ripperda
Harrison Karr
Lucas Narducci